IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) CROSSLAND HEAVY CONTRACTORS, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 14-cv-643-TCK-PJC
(1) JERRY'S DOCK CONSTRUCTION, INC.,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Plaintiff Crossland Heavy Contractors, Inc. opposes Defendant Jerry's Dock Construction, Inc.'s motion to dismiss for failure to state a claim upon which relief can be granted. *See* Mot. (Doc. 10). Jerry's only argument is that the parties have not subjected themselves to a futile mediation effort before litigation begins. Because the agreement's mediation clause requires only attendance at one session before permitting withdrawal and litigation, enforcing the clause at this stage would merely cause delay. Therefore, Crossland requests this Court deny the motion to dismiss.

Alternatively, if the Court is inclined to require mediation before continuing with this litigation, Crossland asks the Court to stay rather than dismiss the case to conserve the court and parties' time when litigation recommences.

I. Background

Crossland does not object to Jerry's Statement of Facts for purposes of this motion only.

II. Argument

A. Crossland States A Claim Regardless Of Mediation Clause.

Mediation differs from arbitration. Mediation is a "nonbinding dispute resolution involving a neutral third party to help disputing parties reach a mutually agreeable solution." *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1240 (11th Cir 2008) (quoting Black's Law Dictionary (7th Ed. 1999)). Mediation is an inherently voluntary process seeking a voluntary result; whereas, arbitration is a binding process that fairly substitutes for court procedures.

> A party should not have the right to bypass arbitration on the contradictory ground that it seeks a trial-like proceeding. It makes far less sense, however, to conclude that the failure to mediate deprives the court of the power to hear a case. Mediation is non-binding, does not involve a contested hearing, and, in general, does not duplicate proceedings in court. The court should retain the power to hear such a case even when the parties have failed to mediate, because no prior trial-like opportunity existed.

Cafarelli v. Colon-Collazo, 2006 WL 1828608, at *5 (Conn. Super. Ct. June 20, 2006) (holding clause making mediation "a condition precedent to . . . the institution of legal or equitable proceeding" does not deprive court of ability to hear case).

The arbitration cases cited in the Motion to Dismiss are inapplicable to mediation clauses. *See* Thomas J. Stipanowich, The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution, 8 Nev. L.J. 427, 445 (2007) ("In almost every way, the 'enforcement' of an agreement to mediate under the FAA or corresponding arbitration law makes no sense because the processes are fundamentally incompatible in nature and purpose."). Arbitration law is "an illogical foundation" for enforcement of mediation agreements. Thus, while "a desperate lawyer or ill-informed court may use arbitration law as a convenient hook for ordering parties to mediation, it means forcing a square peg into a round hole." *Id.* at 447; *see also Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1240 (11th Cir 2008) ("These principles lead clearly to the conclusion that mediation is not within the FAA's scope."). Jerry's reliance on cases involving the Federal Arbitration Act are, therefore, inapposite. *See Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191 (10th Cir. 2009), *Hood Elec., Inc. v. Dodson Const. Co.*, 2009 WL 960638 (E.D. Okla. Apr. 8, 2009).

Mediation agreements are merely agreements to agree. And the particular mediation clause at issue here requires only attendance at one session without even a contractual requirement of good faith. *Contra GVL Pipe & Demolition, Inc. v. Adams Cole & Dalton Rail Serv. LLC*, 2010 WL 4806900, at *1 (W.D. Okla. Nov. 18, 2010) (cited in Mot. at 4) (Subcontract Agreement required parties to "attempt in good faith to mediate" as a condition precedent to litigation). Given the pending lawsuit and the lack of a binding resolution mechanism, requiring a mediator be chosen and the one meeting attendance requirement be satisfied would only stall proceedings. The court should not place form over function. The parties' dispute has progressed past mediation efforts.

Some courts forgo futile mediation clauses. In *Olson v. Harland Clarke Corp.*, a professional services agreement required disputes first be submitted to management for resolution, then "the dispute shall be submitted to mediation." 2012 WL 1821390, at *1 (W.D. Wash. May 18, 2012). If mediation failed, then a binding arbitration would follow. When defendant moved to compel arbitration, plaintiff argued that mediation was a "contractual prerequisite" to binding arbitration. *Id.* at *2. The federal court found that "enforcing the mediation prerequisite would be futile. Therefore, based on these facts, the parties' failure to complete mediation does not preclude the enforcement of arbitration." *Id.*; *see also Cumberland & York Distributors v. Coors Brewing Co.*, 2002 WL 193323, at *4 (D. Me. Feb. 7, 2002) (". . . this court is not required by law to stay actions for purposes of mediation, nor will it do so").

Similarly, here, the court need not require a futile, non-binding mediation.[1]

B. If The Court Requires Mediation, A Stay Is More Proper Than Dismissal.

If the Court requires mediation, Crossland requests the Court stay this case rather than dismiss it. Given its non-binding nature and the ability for either party to withdraw after the first meeting, the likelihood that litigation will continue is high. Staying the proceedings would be the most economical way forward.

III. Conclusion

The conflict has progressed beyond mediation. The one meeting required before either party may withdraw makes the non-binding process even less likely to avoid the ongoing litigation. Crossland requests the Court to deny the motion to dismiss because mediation would be futile.

In the alternative, Crossland requests the Court stay proceedings pending the mediation rather than dismissing the case.

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[1] Additionally, the Court mandates all civil cases be set for a settlement conference. LCvR16.2(b) ("All civil cases set on a trial docket are automatically set for settlement conference before the settlement judge"). When submitting the Joint Status Report, the parties can select the best time to conduct such a mediation. LCvR 16.1. Thus, even if the Court denies the motion, the parties will undertake a mediation effort.

Respectfully submitted,

s/ David Keglovits

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2014, a true and correct copy of the above and forgoing was electronically transmitted using the ECF filing system to the following:

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s/ David Keglovits
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